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IDENTIFYING A PROPER ANALYTICAL FRAMEWORK: CLAIMS OF ADMISSION OF INADMISSIBLE EVIDENCE AS PROSECUTORIAL MISCONDUCT

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I. INTRODUCTION

Prosecutorial error and misconduct can cause significant problems in the criminal justice system. Prosecutors are ministers of

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justice who "may not seek a conviction at any price."[1] A prosecutor has "an affirmative obligation to ensure that a defendant receives a fair trial, no matter how strong the evidence of guilt."[2]

But the prosecutor is not the only actor in the criminal justice system charged with ensuring a defendant's right to a fair trial. The trial court judge "has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice."[3] The defense attorney's duty is more single-minded—to zealously advocate for and protect the rights of the defendant within the bounds of the law.[4]

When a prosecutor presents evidence that the defense attorney believes is inadmissible, the defense attorney must decide whether to object.[5] The defense attorney may object, asking the district court to either prevent the jury from hearing inadmissible evidence or issue a curative instruction.[6] However, the defense attorney may not object because the attorney believes the evidence does not harm the defense.[7] Alternatively, counsel might choose not to object because, if the defendant is convicted, the erroneous admission of evidence might win the defendant a new trial and a second bite at the apple.[8]

On appeal after a conviction at trial, defense counsel in Minnesota often chooses to frame the issue of erroneous admission of evidence as prosecutorial misconduct rather than judicial error in failure to

1. State v. Porter, 526 N.W.2d 359, 362–63 (Minn. 1995) (citing State v. Salitros, 499 N.W.2d 815, 817 (Minn. 1993)).

2. State v. Ramey, 721 N.W.2d 294, 300 (Minn. 2006) (citing State v. Henderson, 620 N.W.2d 688, 701–02 (Minn. 2001); State v. Sha, 292 Minn. 182, 185,193 N.W.2d 829, 831 (1972)).

3. State v. Salitros, 499 N.W.2d 815, 817 (Minn. 1993) (quoting AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE:SPECIAL FUNCTIONS OF THE TRIAL JUDGE § 6-1.1 (2d ed. 1979)).

4. *See id.* at 817 (citing AM. BAR ASS'N , ABA STANDARDS FOR CRIMINAL JUSTICE THE DEFENSE FUNCTION § 4-1.1, Commentary at 3.7 (2d ed. 1979)).

5. *See Ramey*, 721 N.W.2d at 298–99 (contemplating the possibility that defense counsel might deliberately fail to object at trial "to secure reversible error for appeal," but encouraging counsel to object because failure to do so may "waive" claim of misconduct on appeal).

6. *See id.* at 299.

7. *See id.*

8. *See id.* (quoting State v. Ray, 659 N.W.2d 736, 747 n. 4 (Minn. 2003)) (stating that the court would be "concerned" if defense counsel deliberately failed to object in hope of a new trial if defendant is convicted at first trial).

exclude the evidence.[9] The issue is rarely framed as ineffective assistance of trial counsel, even though whether to object is a decision entirely in the hands of defense counsel.[10]

There is sound appellate strategy that favors framing the erroneous admission of evidence as prosecutorial misconduct rather than judicial error or ineffective assistance of counsel. When the defense does not object to an alleged trial error, a defendant on appeal gains a more favorable standard of review by raising a claim of prosecutorial misconduct than by arguing judicial error in the failure to *sua sponte* intervene.[11]

This article will examine the development of the "modified" plain-error standard of review in Minnesota.[12] The article will also show that, regardless of its merits in deterring other types of prosecutorial misconduct, the modified plain-error standard of review is not the proper manner for review of the erroneous admission of evidence.[13] Minnesota courts have inconsistently applied the modified plain-error standard of review when examining claims of prosecutorial misconduct in admitting evidence.[14] Instead of examining such claims as prosecutorial misconduct, they are more properly dealt with as claims of judicial error or ineffective assistance of defense counsel.

9. *See, e.g.*, State v. Mosley, 853 N.W.2d 789, 801 (Minn. 2014); State v. Fields, 730 N.W.2d 777, 781–82 (Minn. 2007); *Jackson*, 714 N.W.2d at 690; *Ray*, 659 N.W.2d at 743–44 (Minn. 2003); State v. Buggs, 581 N.W.2d 329, 339–40 (Minn. 1998), *overruled in part by* State v. McCoy, 682 N.W.2d 153, 160 (Minn. 2004); State v. Williams, 525 N.W.2d 538, 544 (Minn. 1994); State v. Perkins, No. A17-1590, 2018 WL 4558165, at *3 (Minn. Ct. App. Sept. 24, 2018); State v. Moodie, No. A15-0537, 2016 WL 596275, at *2–3 (Minn. Ct. App. Feb. 16, 2016); State v. Valentine, 787 N.W.2d 630, 640 (Minn. Ct. App. 2010); State v. Strong, No. A08-1528, 2009 WL 2745681, at *2 (Minn. Ct. App. Sept. 1, 2009); State v. Mancilla, No. A06-581, 2007 WL 2034241, at *3 (Minn. Ct. App. July 17, 2007); State v. Watts, 452 N.W.2d 728, 731–32 (Minn. Ct. App. 1990); State v. Jahnke, 353 N.W.2d 606, 608, 610 (Minn. Ct. App. 1984). Some of the cases cited herein are discussed below.

10. Only one of the cases cited above—*State v. Jackson*—contains a contention that counsel was ineffective for failing to object to alleged prosecutorial misconduct. *See* 714 N.W.2d at 697–98.

11. *See Ramey*, 721 N.W.2d at 299–300.

12. *See infra* Part II.

13. *See infra* Part III. The *Ramey* court listed several ways a prosecutor can commit misconduct. *See* 721 N.W.2d at 300. This article will discuss only one of them—the erroneous admission of inadmissible evidence.

14. *See infra* Part II.

II. DEVELOPMENT OF THE MODIFIED PLAIN-ERROR STANDARD OF REVIEW AND ITS APPLICATION TO CLAIMS OF ERRONEOUSLY-ADMITTED EVIDENCE

When a defendant argues on appeal that the district court erred by not *sua sponte* excluding evidence to which the defense did not object, the issue may be forfeited but can be reviewed on appeal for plain error.[15] Under plain-error review, a defendant has the burden of showing that there was "(1) error, (2) the error was plain, and (3) the error affected the defendant's substantial rights."[16] The defendant bears a "heavy burden" to show that the error affected substantial rights by depriving the defendant of a fair trial.[17] If a defendant meets this burden of showing plain error that affected the defendant's substantial rights, the appellate court "must then decide whether it should address the issue in order to 'ensure fairness and the integrity of the judicial proceedings.'"[18]

A defendant claiming ineffective assistance of counsel "must show that counsel's performance fell below an objective standard of reasonableness."[19] Scrutiny of an attorney's performance "must be highly deferential," and courts "must indulge a strong presumption that that counsel's conduct falls within the wide range of reasonable professional assistance."[20] When counsel performance is below the bounds of acceptable representation, a reversal will result if there is a reasonable probability "sufficient to undermine the outcome" of the case that, but for counsel's performance, "the result of the proceeding would have been different."[21] Like the plain-error analysis, the burden is on the defendant to show both that counsel's performance fell below an objective standard of reasonableness and that the defendant was prejudiced by counsel's performance.[22]

Nevertheless, a defendant gains a more favorable standard of review when claiming prosecutorial misconduct. In *State v. Ramey*, the Minnesota Supreme Court adopted a modified plain-error test for claims of unobjected-to prosecutorial misconduct.[23] A defendant

15. State v. Tscheu, 758 N.W.2d 849, 863 (Minn. 2008).
16. *Id.*
17. State v. Griller, 583 N.W.2d 736, 741 (Minn. 1998).
18. State v. Vick, 632 N.W.2d 676, 685 (Minn. 2001) (citing *Griller*, 583 N.W.2d at 740).
19. Strickland v. Washington, 466 U.S. 668, 688 (1984).
20. *Id.* at 689.
21. *Id.* at 694, 703.
22. *Id.* at 688, 696.
23. 721 N.W.2d 294, 299–300 (Minn. 2006).

making such a claim on appeal still bears the burden of showing plain error.[24] But rather than assigning the defendant the burden of showing the error affected her substantial rights, the State must instead persuade the appellate court that the plain error was not prejudicial in that it did not affect the defendant's substantial rights.[25]

By adopting the modified plain-error test, the majority in *Ramey* intended to provide strong incentives for prosecutors to avoid misconduct.[26] But, as then-Associate Justice Gildea observed in a concurring opinion, the rule announced in *Ramey* provides a disincentive for defense counsel to object at trial to possible misconduct.[27] Instead of objecting and dealing with any error before it prejudices the defense, defense counsel may choose not to object.[28] If the defendant is convicted, counsel might obtain a second trial and a second chance at acquittal, but only if the State cannot prove the error did not substantially affect the defendant's rights.[29]

Despite the criticism leveled at the modified plain-error test adopted in *Ramey*,[30] Minnesota law still requires appellate review of claims of unobjected-to prosecutorial misconduct.[31] *Ramey* created an incentive to reframe what is traditionally judicial error—the erroneous admission of evidence by the prosecutor—as prosecutorial misconduct.[32] Appellate counsel often does so,and the appellate courts often appear to pay little attention to the crucial roles of the trial judge and defense counsel in excluding inadmissible evidence.[33]

The erroneous admission of evidence should typically be treated as judicial error or ineffective assistance of counsel. Some Minnesota

24. *Id.* at 302.

25. *Id.*

26. *Id.* at 302–03.

27. *Id.* at 306 (Gildea, J., concurring) (citing State v. Ray, 659 N.W.2d 736, 747 n.4 (Minn. 2003)).

28. *See* James A. Morrow & Joshua R. Larson, *Without a Doubt, a Sharp and Radical Departure: The Minnesota Supreme Court's Decision to Change Plain Error Review of Unobjected-To Prosecutorial Error in State v. Ramey*, 31 HAMLINE L. REV. 351, 354 (2008).

29. *See id.* at 357.

30. *See id.* at 394 (stating the majority in *Ramey* "formulated the notion of shifting the burden of proof within the plain error context completely on its own.").

31. *See, e.g.*, State v. Johnson, 915 N.W.2d 740, 746 (Minn. 2018) (citing directly to *Ramey* to explain the standard and concluded the State had not carried its burden to show the lack of prejudice).

32. *See* Morrow & Larson, *supra* note 28, at 357–58.

33. *See id.*

trial court decisions make this clear.[34] But those decisions are often not cited in appellate decisions, which appear to equate the admission of inadmissible evidence during the State's case-in-chief to prosecutorial misconduct.[35] Minnesota appellate courts should not allow such a false equivalency and instead, should place the impetus for ordinary claims of erroneous admission of evidence where it belongs—on the trial judge and defense counsel.

In *Ramey,* the Minnesota Supreme Court listed numerous ways in which a prosecutor can commit misconduct:

> [E]liciting inadmissible evidence, alluding in argument to the defendant's exercise of the right not to testify, or to the defendant's failure to call witnesses, misstating the presumption of innocence, or the burden of proof, interjecting the prosecutor's personal opinion about the veracity of witnesses, inflaming the passions and prejudices of the jury, disparaging the defendant's defense to the charges, and injecting race into the case when race is not relevant.[36]

The *Ramey* court referred to the elicitation of inadmissible evidence—without further description or qualification—as prosecutorial misconduct.[37] But other Minnesota cases have made clear that the mere elicitation of inadmissible evidence does not rise to the level of misconduct.[38]

Over twenty years before *Ramey*, the Minnesota Supreme Court held that a prosecutor may not "knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury to offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury."[39]

The clearest restatement of *White* in more modern cases comes in a concurring opinion in *State v. Jackson*.[40] A jury found Jackson

34. *See id.*
35. *See id.* at 354–56.
36. State v. Ramey, 721 N.W.2d 294, 300 (Minn. 2006) (citations omitted).
37. *Id.*
38. State v. Campos, No. C1-99-1333, 2000 Minn. App. LEXIS 598, at *5–6 (Minn. Ct. App. 2000) ("This court will not reverse the trial court's denial of a motion for a mistrial absent an abuse of discretion. A conviction will not be reversed based on a prosecutor's unintentional elicitation of inadmissible evidence unless the evidence caused prejudice to defendant.").
39. State v. White, 203 N.W.2d 852, 857 (1973).
40. 714 N.W.2d 681 (Minn. 2006) (Hanson, J., concurring).

guilty of aiding and abetting the commission of three crimes: first-degree premeditated murder, second-degree intentional murder, and second-degree intentional murder for the benefit of a gang.[41] At trial, the State's evidence included the testimony of a sheriff's deputy.[42] The deputy testified as an expert on gangs.[43] The deputy's testimony included evidence about "gang culture and Jackson's gang membership."[44] The deputy also testified about to his opinion about whether the murder "was committed for the benefit of a gang."[45] Jackson did not object to any of the expert testimony.[46]

Despite *Jackson* being decided prior to *Ramey*, Jackson's appellate counsel argued that the prosecutor committed misconduct by introducing the deputy's expert testimony.[47] The majority in *Jackson* began its analysis of the misconduct claim by stating, "It is improper for a prosecutor to intentionally elicit inadmissible and highly prejudicial testimony."[48]

After discussing recent holdings regarding the admissibility of gang testimony, the court turned its attention to whether the expert testimony was properly admitted.[49] The court concluded that most of the evidence was properly admitted.[50] The court also found that "it may have been error to introduce" some of the expert testimony.[51] However, the court ultimately concluded, "reversal is not warranted because any such error did not affect Jackson's substantial rights."[52]

The majority concluded its analysis of the misconduct claim with a purely evidentiary analysis:

> [The deputy's] testimony, therefore, simply corroborated the testimony of numerous witnesses and likely was no more influential than much of the other evidence presented linking Jackson to the Bloods and to the shooting. Thus, while [the deputy's] testimony may have brought the weight of expert opinion to bear on the gang issues, we conclude

41. *Id.* at 687 (majority opinion).
42. *Id.* at 688.
43. *Id.*
44. *Id.* at 690.
45. *Id.*
46. *Id.*
47. *Id.* (citing State v. Henderson, 620 N.W.2d 688, 702 (Minn. 2001)).
48. *Id.*
49. *Id.* at 691–93.
50. *Id.* at 692–93.
51. *Id.* at 693.
52. *Id.*

> that it did not have a significant effect on the jury's verdict. Thus, any error in the admission of [the deputy's] testimony did not affect Jackson's substantial rights, and Jackson's claim fails.[53]

Jackson also argued that he received ineffective assistance of trial counsel based, in part, on his counsel's failure to object to the "misconduct" of introducing the expert testimony in question.[54] The majority quickly dispensed with this claim, finding in its conclusion that there was no prejudicial misconduct showing that Jackson did not satisfy *Strickland*'s prejudice prong.[55]

Justice Sam Hanson, in an opinion joined by Justices Paul H. Anderson and Helen Meyer,[56] agreed with the outcome but urged a different analysis regarding the alleged prosecutorial misconduct for eliciting the expert testimony at issue:

> As to the gang expert testimony, Jackson curiously did not argue that the district court erred in admitting the testimony, but only that the state committed prosecutorial misconduct by offering it. By limiting his argument in this way, Jackson has imposed on himself a higher threshold than plain error. In addition to showing that the evidence was plainly inadmissible and sufficiently prejudicial to affect his substantial rights, Jackson must also show that the state had no good-faith basis to argue for admissibility and elicited the testimony knowing that it was inadmissible. Because our prior decisions do not establish absolutely clear boundaries on gang expert testimony, I conclude that Jackson failed to meet this higher threshold.[57]

After concluding that Jackson failed to meet his self-imposed higher threshold for arguing prosecutorial misconduct, Justice Hanson said that he believed virtually *none* of the expert testimony should have been admitted on its merits.[58] But Justice Hanson said he

53. *Id.*

54. *Id.* at 697.

55. *Id.* at 697–98.

56. The opinion of the court, written by Justice Page, was joined by two other justices. Justice Gildea did not participate in the consideration or decision of the case. *Id.* at 698. It is unclear to this author why the opinion of Justice Page, rather than Justice Hanson, is considered the opinion of the court, given the 3–3 split among the justices.

57. *Jackson,* 714 N.W.2d at 698 (Hanson, J. concurring) (citations omitted).

58. *Id.* at 698–99 (suggesting that the same result reached by the majority could be reached by different means).

would not exercise the court's discretion to review the admission of the evidence for plain error because counsel intentionally did not object to the evidence "and then affirmatively develop[ed] and expand[ed] the evidence on cross-examination.[59] Justice Hanson "question[ed] the wisdom" of counsel's trial strategy but concluded that the record was insufficient to decide an ineffective assistance of counsel claim.[60]

Justice Hanson's concurring opinion effectively distinguished between prosecutorial misconduct in the admission of evidence and judicial error and ineffective assistance of counsel.[61] But no subsequent Minnesota appellate decisions have cited Justice Hanson's concurring opinion in making such a distinction. Indeed, in many cases, Minnesota appellate courts fail to clearly make such a distinction at all.[62]

III. MINNESOTA APPELLATE COURTS OFTEN EQUATE THE INTRODUCTION OF INADMISSIBLE EVIDENCE WITH PROSECUTORIAL MISCONDUCT.

The Minnesota Supreme Court and the Minnesota Court of Appeals have failed to differentiate between the introduction of inadmissible evidence and prosecutorial misconduct both before and after *Ramey*. In some of these cases, the result might have been the same had the issue been analyzed as judicial error or ineffective assistance of counsel. But a survey of relevant cases demonstrates the significance of properly framing the issue—i.e. whether the prosecutor committed prosecutorial misconduct or whether defense counsel was provided the proper incentive to object to the introduction of the otherwise inadmissible evidence.

A. State v. Williams

A jury found Paula Williams guilty of a first-degree controlled substance offense for possessing cocaine with the intent to sell.[63] The

59. *Id.* at 699.

60. *Id.* (suggesting that the issue of ineffective assistance of counsel should be preserved for review by postconviction petition).

61. *Id.* at 698–701 (discussing the admissibility of gang expert testimony).

62. *See infra* Part III.

63. State v. Williams, 525 N.W.2d 538, 540 (Minn. 1994) (possessing more than 10 grams of cocaine with intent to sell in violation of Minn. Stat. § 152.021, subdiv. 1(1) (1992)).

Minnesota Court of Appeals affirmed Williams' conviction.[64] The Minnesota Supreme Court granted review and reversed because the prosecutor "committed plain error" by eliciting inadmissible evidence and making improper statements in closing argument.[65] The Minnesota Supreme Court concluded that Williams "did not receive a fair trial."[66]

Williams did not object to any of the alleged prosecutorial misconduct at trial.[67] The *Williams* opinion, which was issued over twenty years before *Ramey* was decided, applied standard plain-error review.[68]

The *Williams* court first took issue with the admission of a "tip" received by a police officer from a border patrol agent that Williams was on the train where she was found and "was believed to be working as a drug courier carrying a quantity of crack cocaine."[69] The court restated a previous holding that "a police officer testifying in a criminal case may not, under the guise of explaining how [the] investigation focused on defendant, relate hearsay statements of others."[70] The Minnesota Supreme Court concluded that the evidence was "pure hearsay evidence not admissible under any exception to the hearsay rule."[71] Although the prosecutor told the jury during closing argument that the evidence was offered only to show why officers went to the train station and approached Williams, the court believed it unlikely that the jury did not consider the evidence substantive.[72]

The court next turned its attention to evidence from a police officer that Williams fit a "drug courier profile."[73] According to the court, "'[a] drug courier profile' is 'an informally compiled abstract of characteristics thought typical of persons carrying illegal drugs.'"[74] The court engaged in a lengthy criticism of drug courier profiles and

64. *Id.*at 540; State v. Williams, 510 N.W.2d 252 (Minn. Ct. App. 1994).
65. *Williams*, 525 N.W.2d at 540.
66. *Id.* at 544.
67. *Id.*
68. *Id.*
69. *Id.* at 544–45.
70. *Id.* at 544 (alternation in original) (quoting State v. Cermak, 365 N.W.2d 243, 247 (Minn. 1985)).
71. *Id.* at 545.
72. *Id.*
73. *Id.*
74. *Id.* (quoting United States v. Mendenhall, 446 U.S. 544, 547 n.1 (1980)).

stated its belief that such profiles are likely racially discriminatory.[75] The Minnesota Supreme Court acknowledged that it had not previously addressed the admissibility of drug courier profiles at trial as evidence of guilt.[76] The court stated that the rule identified by most courts that had addressed the issue was that drug courier profile evidence was usually—but not always —inadmissible to show a defendant's guilt.[77]

Although the rule was not uniform across other jurisdictions, and although the Minnesota Supreme Court had not previously ruled on the issue, the *Williams* court held that "the evidence admitted in this case [was] clearly and plainly inadmissible."[78] The court concluded that the prosecutor committed misconduct by introducing inadmissible evidence and making an improper statement during closing argument.[79] Because the court concluded that the misconduct likely affected the verdict, it reversed Williams's conviction and remanded for a new trial.[80]

The *Williams* decision made no distinction between the introduction of inadmissible evidence and prosecutorial misconduct. *Williams* did not cite *White*'s formulation of prosecutorial misconduct, which was issued over twenty years before *Williams* was decided. Indeed, the *Williams* court provided no formulation whatsoever of what constitutes prosecutorial misconduct in the introduction of evidence.[81]

Perhaps most remarkably, it appears that the issue was raised at the court of appeals as a question of judicial error, not prosecutorial misconduct.[82] The court of appeals opinion stated that Williams

75. *Id.* at 545–47 ("One does not have to be a cynic to believe that, despite protestations to the contrary, a key but unarticulated and, perhaps, unrecognized factor in many cases is that the person's skin is, to use the words of Rodgers and Hammerstein, 'of a different shade.'" (citation omitted)).

76. *Id.* at 548.

77. *Id.* (citations omitted).

78. *Id.*

79. *Id.* at 549.

80. *Id.*

81. *See id.* (referring to "eliciting the inadmissible hearsay evidence relating to the tip, . . . eliciting the inadmissible evidence that defendant fit a drug courier profile used by the officers, and [improper statements] in her closing argument" as prosecutorial misconduct but failing to cite any law or precedent).

82. State v. Williams, 510 N.W.2d 252, 255 (Minn. Ct. App. 1994). According to the court of appeals' statement of the issues, Williams did not even raise to that court the issue of the officers' hearsay statements at trial. *Id.* at 254.

framed the issue as whether "the trial court erred in receiving 'drug courier profile' evidence."[83] The court of appeals concluded that Williams waived the issue by not objecting to the evidence at trial.[84]

The *Williams* court could have reached the same conclusion without finding that the prosecutor committed misconduct by introducing inadmissible evidence. Because *Williams* was decided before *Ramey*, the standard of review would have been the same had the court instead decided whether the district court committed plain error by admitting the evidence.[85] Thus, the standard of review for the unobjected-to testimony regarding drug courier profiles was whether the trial court committed error by allowing it to be heard by the jury, and whether it affected William's substantial rights to a fair trial.[86]

Because the *Williams* court concluded that the evidence was clearly inadmissible and affected the outcome, the result would have been the same. Instead, the prosecutor in *Williams* was told by the highest court in the state that they had committed misconduct, even though neither the judge nor defense attorney thought the evidence was so obviously inadmissible that they intervened.[87]

B. State v. Mosely

After a bench trial, a judge convicted Eddie Mosely of three counts of first-degree premeditated murder.[88] On appeal, Mosley argued that the prosecutor committed prosecutorial misconduct by

83. *Id.* at 255.

84. *Id.* The general rule is that a defendant waives a challenge to the admission of evidence unless there is a timely objection at trial, and this rule has been applied to the admission of opinion testimony. *See* State v. Cromey, 348 N.W.2d 759, 760 (Minn. 1984).

85. *Compare* State v. Caron, 300 Minn. 123, 127, 218 N.W.2d 197, 200 (1974) (analyzing prosecutorial misconduct based only on the defendant's arguments), *with* State v. Shamp, 427 N.W.2d 228, 230–31 (Minn. 1988) (analyzing the lower court's plain error based only on the defendant's arguments).

86. MINN R. CRIM. P. 31.02. An error affects substantial rights if it is "prejudicial and affect[s] the outcome of the case." *See* State v. Griller, 583 N.W.2d 736, 741 (Minn. 1998); *see also* State v. Watkins, 840 N.W.2d 21, 28 (Minn. 2011) (an error in instructing the jury is prejudicial if there is a reasonable likelihood that giving the instruction in question had a significant effect on the jury's verdict).

87. *See Williams*, 525 N.W.2d at 548–49; *see also Williams*, 510 N.W.2d at 255 (holding that the trial court did not commit plain error because there was no timely objection at trial).

88. State v. Mosley, 853 N.W.2d 789, 793 (Minn. 2014).

"eliciting three types of inadmissible character evidence."[89] Mosley did not object to any of the evidence.[90] The Minnesota Supreme Court set forth a variation on the *White* standard for prosecutorial misconduct for elicitation of inadmissible evidence: "It is generally misconduct for a prosecutor to 'knowingly offer inadmissible evidence for the purpose of bringing it to the jury's attention.'"[91]

The court first examined evidence that Mosley "was likely a drug dealer."[92] The court assumed, without deciding, that the references to drugs were plain error.[93] The court concluded that the testimony was "largely irrelevant" but "very limited."[94] Because the evidence of Mosley's guilt was "overwhelming," the court found that any error did not affect Mosley's substantial rights.[95]

Mosley next argued that the prosecutor improperly elicited testimony that he lived with and had relationships with three women, all of whom were pregnant with Mosley's children.[96] The court found the evidence relevant to rebut Mosley's claimed alibi.[97] The court concluded that "it was not plain error for the prosecutor to elicit the testimony" in question.[98]

Mosley's third argument was that the prosecutor committed misconduct by introducing an exhibit containing Mosley's text messages.[99] The exhibit contained over 2,700 text messages sent and received by Mosely over a six-month period.[100]

The Minnesota Supreme Court found that some of the text messages were "clearly relevant" to demonstrate Mosley's motive to commit the murders.[101] But other text messages, such as those "contain[ing] graphic sexual references and possible references to

89. *Id.* at 801.
90. *Id.*
91. *Id.* (quoting State v. Milton, 821 N.W.2d 789, 804 (Minn. 2012)).
92. *Id.*
93. *Id.* (distinguishing between assumption of plain error and legal conclusion of plain error).
94. *Id.*
95. *Id.*
96. *Id.* at 802.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 803.

prostitution," were not.[102] The court stated it was "troubled that the prosecutor chose not to redact some of the messages."[103]

The *Mosley* court assumed, "without deciding", that the failure to redact some of the text messages constituted plain error.[104] Despite being "troubled" by the error, the court affirmed Mosley's conviction, concluding that the admission of the "inflammatory" text messages did not affect Mosley's substantial rights.[105]

The court found that "the evidence against Mosley was strong."[106] Due to the overwhelming nature of the evidence against *Mosley*, the Minnesota Supreme Court could have taken the opportunity to explain the difference between the erroneous admission of evidence and prosecutorial misconduct through admission of inadmissible evidence without affecting the outcome of the case.

Although the court's analysis began with a proper framing of the rule against the elements of intentional and knowing admission of inadmissible evidence, the court did not actually employ the rule. Instead, the court focused on the potential of prosecutorial misconduct through the inadmissibility of certain evidence, ultimately concluding that "there [was] no reasonable likelihood that the text messages" affected the court's finding of Mosely's guilt.[107] This case failed to consider the heightened *mens rea* requirement necessary to find prosecutorial misconduct during the admission of evidence at trial. It also ignored the defense attorney and trial judge's roles as gatekeepers of evidence presented at trial.

C. State v. Strong

A jury found Marvin Strong guilty of two counts of second-degree criminal sexual conduct for sexually abusing his girlfriend's daughters.[108] Without objection, the State introduced evidence that Strong had a prior conviction for criminal sexual conduct, had sexually

102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. State v. Strong, No. A08-1528, 2009 WL 2745681, at *1–2 (Minn. Ct. App. Sept. 1, 2009).

abused one of the victims on a prior occasion,[109] was on probation, and had violated his probation.[110] The evidence that Strong violated his probation included details of how he had done so.[111] The prosecutor asked Strong's probation officer about obtaining a warrant for Strong's arrest for probation violations, which led to testimony that Strong had failed to comply with predatory offender registration requirements.[112] The prosecutor also cross-examined Strong about the conditions of his probation and probation violations.[113]

The Minnesota Court of Appeals did not question Strong's assertion that the admission of the evidence, if erroneous, was prosecutorial misconduct rather than judicial error.[114] The State argued on appeal that the evidence was not subject to the procedural requirements of other-act evidence and was therefore admissible.[115] The court disagreed and held that the evidence should have been excluded for several reasons.[116]

After finding that the prosecutor had committed plain error by introducing the evidence—all without objection sufficient to preserve the issue for appeal—the court turned to the question of whether the error affected Strong's substantial rights.[117] The court concluded that the prosecutor's misconduct deprived Strong of a fair trial due to the prejudicial nature of the evidence.[118]

The Minnesota Court of Appeals concluded its opinion by addressing the state's argument that the inadmissible evidence was

109. Strong's only objection was to the testimony of A.T., a minor, but he never articulated a basis for the objection. *Id.* at *2. Because Strong did not articulate a basis for the objection, the court of appeals considered the issue waived and utilized the plain-error standard of review. *Id.*

110. *Id.* at *1.

111. *Id.*

112. *Id.*

113. *Id.*

114. *See id.* at *1–7.

115. *Id.* at *3. *See id.* at *2 (citing State v. Lynch, 590 N.W.2d 75, 80 (Minn. 1999)) ("Generally, evidence of other crimes or misconduct, known in Minnesota as *Spreigl* evidence, is not admissible to prove a defendant's character in order to show that the defendant acted in conformity with that character.").

116. *Id.* at *4–5.

117. *Id.* at *5–6.

118. *Id.*

not intentionally elicited.[119] Despite the court's finding that most of the evidence was intentionally elicited, it maintained that "even when inadmissible evidence is unintentionally elicited, appellate courts will reverse if the appellant was prejudiced by the evidence."[120] The court reversed Strong's conviction and remanded for a new trial "[b]ecause appellant was prejudiced by the inadmissible" evidence of prior bad acts.[121]

Though the unpublished decision of the Minnesota Court of Appeals did not engage in a lengthy legal analysis of the evidence it believed was improperly admitted, its conclusion that the evidence should not have been admitted was likely correct.[122] However, the court erred by simply accepting Strong's characterization of the mistake as prosecutorial misconduct rather than judicial error.[123] After all, the trial judge could have—and by the reasoning of the court,, should have—intervened *sua sponte* to exclude the evidence.[124] Additionally, there is no indication the prosecutor subtly and slyly slipped the evidence past an unsuspecting defense attorney and judge.[125] Thus, the amount of inadmissible evidence presented at trial should have raised concerns for all parties involved, prompting challenges to the admissibility of the evidence.[126]

The *Strong* court even appeared to acknowledge as much in a footnote.[127] The court noted that, due to Strong's failure to object to the evidence in question, the district court was not asked to stop its introduction.[128] However, the court concluded that the inadmissible evidence "was so inherently prejudicial—and there was so much of it—that, when combined, the prosecutor's misconduct and the district

119. *Id.* at *7 ("Finally, the state argues that it should not be held responsible for the errors at trial because the inadmissible evidence was unintentionally elicited. We disagree.").

120. *Id.* (citing State v. Haglund, 267 N.W.2d 503, 506 (Minn. 1978) ("[E]ven when the elicitation is unintentional, we will reverse if the evidence is prejudicial.").

121. *Id.*

122. *See* MINN. R. EVID. 404(b) (prohibiting introduction of prior bad acts as evidence in criminal prosecution unless procedural and substantive requirements are satisfied).

123. *Strong*, 2009 WL 2745681, at *2.

124. *Id.* at *1–2.

125. *Id.*

126. *Id.*

127. *See id.* at *5 n.2.

128. *Id.*

court's failure to intercede *sua sponte*, resulted in appellant being deprived of a fair trial."[129]

The issue here should have been framed as judicial error—or perhaps ineffective assistance of counsel—rather than prosecutorial misconduct.[130] The opinion did not show that the prosecutor knew that he or she was introducing inadmissible evidence.[131] At best, the opinion can be read to imply that the prosecutor should have known the evidence was inadmissible.[132] But the test for prosecutorial misconduct in the introduction of evidence may require actual knowledge, not merely constructive knowledge.[133] As a result, a prosecutor who might have believed he or she had a valid reason to introduce the evidence was found to have committed misconduct. The same result could have, and almost certainly would have, been reached under a claim of judicial error or ineffective assistance of counsel.

IV. MINNESOTA COURTS SHOULD ADOPT JUSTICE HANSON'S CONCURRING OPINION IN *JONES*

Justice Hanson's formulation of the standard of review in his concurring opinion in *Jones* provided the proper framework for evaluating claims of prosecutorial misconduct in the elicitation of evidence.[134] Justice Hanson's opinion did not break new ground.[135] On the contrary, it simply quoted a standard the Minnesota Supreme Court had set forth more than twenty years earlier in *White*.[136] But it

129. *Id.*

130. *See id.*

131. *See id.* at *1–3.

132. *See id.* at *3.

133. *See* Templeton v. United States, No. MO:12-CV-010-RJ-DC, 2014 WL 12823747, at *7 n.1 (W.D. Tex. June 18, 2014) ("Some courts in this circuit seem to have recently interpreted *United States v. Mairanne*, 668 F.2d 980, 989 (5th Cir. 1982), as holding that a successful prosecutorial misconduct claim merely requires showing that the Government had constructive knowledge—as opposed to actual knowledge—that one of its witnesses would testify falsely at trial. . . . This Court does not believe such an interpretation of *Mairanne* is correct.").

134. *See* State v. Jones, 678 N.W.2d 1, 26–27 (Minn. 2004) (Hanson, J., concurring).

135. *See id.*

136. *Compare id. with* State v. White, 203 N.W.2d 852, 857–58 (1973). A clear statement of the standard of prosecutorial misconduct is provided in State v. Jackson, 714 N.W.2d 681, 698 (Minn. 2006) (Hanson, J., concurring) (stating that Defendant "did not argue that the district court erred in admitting the testimony" and instead

made clear a particularly important point: prosecutorial misconduct is not the same as judicial error.[137]

The fact that evidence later found inadmissible has been presented to a jury does not mean the prosecutor has committed misconduct.[138] In Minnesota, the defense counsel has good reason to frame many claims of error in the admission of evidence as prosecutorial misconduct because, under *Ramey*, it provides a less-deferential standard of review than typical plain-error review.[139] Minnesota's appellate court should be diligent about distinguishing between the two.[140]

There is no reason to believe the *Ramey* court intended to overrule prior precedent regarding plain error by the district court in failing to exclude unobjected-to evidence that is plainly inadmissible.[141] Although some cases, including those discussed above, have conflated inadmissibility with misconduct, it does not appear that those cases intended to materially change the law.[142]

Equating inadmissibility with misconduct is problematic for at least three reasons. First, equating the two concepts means that the less-deferential modified plain-error standard of review could be employed in every case in which evidence is erroneously admitted. Second, equating the concepts diminishes the role of the trial judge and instead places the prosecutor in the role of being the final arbiter of admissibility, at least when there is no objection to the evidence.

only argued that "the state committed prosecutorial misconduct," thereby limiting his argument and imposing a "higher threshold than plain error."). The higher threshold required a "showing that the evidence was plainly inadmissible and sufficiently prejudicial to affect his substantial rights . . . [and] also [a] show[ing] that the state had no good-faith basis to argue for admissibility and elicited the testimony knowing that it was inadmissible." *Id.*

137. *See Jones*, 678 N.W.2d at 26–27.

138. State v. Outlaw, 748 N.W.2d 349, 358 (Minn. Ct. App. 2008) (holding "a prosecutor is free to make legitimate arguments on the basis of all proper inferences from the evidence introduced."); *see also* State v. Steward, 645 N.W.2d 115, 122 (Minn. 2002)–(arguing it is prosecutorial misconduct to purposefully mention inadmissible evidence in order to make the jury aware of the evidence).

139. *See* State v. Ramey, 721 N.W.2d 294, 303 (Minn. 2006) (finding that appellate courts "retain the authority in the appropriate case to reverse . . . without regard to whether the defendant was prejudiced.").

140. *See id.*

141. *See generally id.*

142. *See generally* State v. Mosley 853 N.W.2d 789 (Minn. 2014); State v. Strong, No. A08-1528, 2009 WL 2745681 at *5 (Minn. Ct. App. Sept. 1, 2009); State v. Williams, 525 N.W.2d 538 (Minn. 1994).

Finally, equating inadmissibility with misconduct will result in prosecutors acting in good faith yet committing misconduct when they misjudge the admissibility of evidence.

A. The Minnesota Supreme Court Did Not Intend to Apply the Modified Plain-Error Standard to Every Case in Which Evidence Was Erroneously Admitted Without Objection.

Before concluding that the modified plain-error standard was appropriate for reviewing claims of unobjected-to prosecutorial misconduct, the *Ramey* court decided that some form of plain-error review was appropriate.[143] The court reasoned that plain-error review encourages defendants to object to error as it occurs while still allowing for the redress of "obvious injustice."[144]

The *Ramey* court held that the modified plain-error standard of review should apply "when prosecutorial misconduct reaches the level of plain or obvious error-conduct the prosecutor should know is improper-the prosecution should bear the burden of demonstrating that its misconduct did not prejudice the defendant's substantial rights."[145]

The *Ramey* court listed several types of prosecutorial misconduct that Minnesota courts had previously recognized.[146] One method in which a prosecutor can commit misconduct is, regrettably, phrased simply as "eliciting inadmissible evidence."[147] But the court went on

143. 721 N.W.2d at 297–99.

144. *Id.* at 298–99.

145. *Id.* at 299–300.

146. *See e.g.,* State v. Cabrera, 700 N.W.2d 469, 475 (Minn. 2005) (injecting race into the case when race is not relevant); State v. Griese, 565 N.W.2d 419, 427 (Minn. 1997) (disparaging the defendant's defense to the charges); State v. Whittaker, 568 N.W.2d 440, 450–51 (Minn. 1997) (alluding to the defendant's exercise of the right not to testify); State v. Porter, 526 N.W.2d 359, 363–64 (Minn. 1995) (inflaming the passions and prejudices of the jury); State v. Harris, 521 N.W.2d 348, 353–54 (Minn. 1994) (eliciting inadmissible evidence); State v. Salitros, 499 N.W.2d 815, 818 (Minn. 1993) (misstating the presumption of innocence);State v. Parker, 417 N.W.2d 643, 647 (Minn. 1988) (alluding to the defendant's failure to call witnesses); State v. Coleman, 373 N.W.2d 777, 782 (Minn. 1985) (misstating the burden of proof); State v. Ture, 353 N.W.2d 502, 516 (Minn. 1984) (interjecting the prosecutor's personal opinion about the veracity of witnesses). .

147. *Ramey,* 721 N.W.2d at 297–99 (citing State v. Harris, 521 N.W.2d 348, 353–54 (Minn. 1994).

to characterize the behavior that would be deterred as "conduct that prosecutors should know is clearly forbidden."[148]

The *Ramey* court made a substantial change to the law of appellate review of criminal convictions.[149] But if the *Ramey* court had intended to modify the plain-error standard of review for issues of misconduct, it would have. To the contrary, many subsequent cases have analyzed the erroneous admission of inadmissible evidence for plain error.[150] Although *Ramey* was a remarkable shift in the law, that shift was limited to claims of unobjected-to prosecutorial misconduct.[151]

B. Equating Inadmissibility with Misconduct Diminishes the Role of the Trial Judge.

A trial judge "is not a passive moderator at a free-for-all" but is instead the "administrator of justice [who] has an affirmative obligation to keep counsel within bounds and to insure that the case is decided on the basis of relevant evidence and the proper inferences therefrom, not on the basis of irrelevant or prejudicial matters."[152] The duties of the trial judge include, when appropriate, "raising on his or her initiative . . . matters which may significantly promote a just determination of the trial."[153] Any violation of professional norms during a trial should be dealt with promptly by the judge.[154]

If a judge observes a prosecutor admitting evidence that is clearly inadmissible, the judge should, consistent with his or her duties, put a stop to it.[155] At the very least, the judge could call a sidebar, inform the parties that the evidence is inadmissible, and ask defense counsel if they wish to object.[156] If counsel objects, the district court can sustain the objection and ensure that the inadmissible evidence does

148. *Id.* at 302.

149. *See* James Morrow, *Without a Doubt, A Sharp and Radical Departure: The Minnesota Supreme Court's Decision to Change Plain Error Review of Unobjected-To Prosecutorial Error in State v. Ramey*, 31 HAMLINE L. REV. 353, 402–03 (2008) (discussing the decision of the justices to do something "bold").

150. *See, e.g.*, State v. Sontoya, 788 N.W.2d 868, 872–74 (Minn. 2010) (reviewing unobjected-to evidence under traditional plain-error standard).

151. *Ramey*, 721 N.W.2d at 302.

152. State v. Salitros, 499 N.W.2d 815, 817 (Minn. 1993).

153. *Id.*

154. *See id.*

155. *Salitros,* 499 N.W.2d at 817.

156. *Id.*

not affect the outcome.[157] If counsel chooses not to object, the court could make a record outside the jury's presence to allow counsel to explain the lack of objection.[158]

But if the error is clear, and the district court judge does nothing, it is far from clear that the prosecutor commits misconduct by eliciting inadmissible evidence.[159] Although the prosecutor is a minister of justice, counsel in an adversarial system must rely on each other and the bench to act as a check on behavior that might not seem improper to the person who is doing it.[160] Finding prosecutorial misconduct for the admission of evidence when the judge does not interject ignores the judge's role in ensuring a fair trial to both parties.[161]

C. Equating Inadmissibility with Misconduct Ignores Defense Counsel's Duty of Zealous Advocacy While Ignoring Trial Strategy.

Unlike the prosecutor, defense counsel's primary duty is to their client.[162] Trial strategy employed by criminal defense attorneys is entitled to near-complete deference if a defendant later makes a claim of ineffective assistance of counsel.[163] Counsel may choose not to object to errors at trial because the error might benefit the defense or because counsel does not wish to highlight it.[164]

But on appeal, absent a claim of ineffective assistance of counsel, the record may not reflect that counsel made a strategic decision not to object. And the prosecutor could be found to have committed

157. *Id.*

158. AM. BAR ASS'N. ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-7.6(e) (4th ed. 2015) (stating that defense counsel should "exercise strategic judgment regarding whether to object or take exception to evidentiary rulings that are materially adverse to the client, and not make every possible objection.").

159. *Salitros*, 499 N.W.2d at 817.

160. *Id.*

161. *See id.*

162. AM. BAR ASS'N, *supra* note 158, § 4-1.2(b).

163. *See, e.g.*, State v. Vick, 632 N.W.2d 676, 688 (Minn. 2001) ("[A]ppellate courts do not review matters of trial strategy for competency.").

164. *See, e.g.*, State v. Tovar, 605 N.W.2d 717, 725–26 (Minn. 2000) (finding it was not plain error for the district court to decline to *sua sponte* instruct the jury that statements of police during custodial interview were not evidence when defendant attempted to use the statements to his advantage, and that there were "sound reasons of trial strategy" for defendant not to object).

misconduct, regardless of whether she knowingly elicited clearly inadmissible evidence.[165]

Equating the introduction of inadmissible evidence with prosecutorial misconduct ignores the vital roles of the two other pillars of the criminal justice system—the judge and defense counsel. But adopting Justice Hanson's standard imposing a higher burden to prevail on a claim of prosecutorial misconduct in the elicitation of inadmissible evidence puts the onus where it belongs.

By changing the standard of review on appeal in *Ramey*, the Minnesota Supreme Court—whether intentionally or not—incentivized convicted defendants to frame their arguments under the guise of prosecutorial misconduct.[166] *Ramey* has led to analysis in some cases involving claims of improper admission of evidence for which no objection was made as the product of misconduct rather than judicial error or ineffective assistance of defense counsel.[167]

Unless the defense can show that the prosecutor knew evidence was obviously inadmissible but elicited it anyway, the onus should be on the court, defense counsel, or both as much as the prosecutor. Equating the elicitation of evidence later deemed inadmissible with misconduct unfairly penalizes prosecutors who might well be acting in good faith, while also ignoring the role defense counsel and the judge played in the failure to exclude the evidence. The Minnesota Supreme Court should make clear, as Justice Hanson did in *Jackson*,[168] that a prosecutor commits misconduct by eliciting inadmissible evidence only if the prosecutor knows the evidence is inadmissible but elicits it anyway.

V. CONCLUSION

Prosecutors do not commit misconduct merely by introducing evidence that an appellate court later determines should not have been admitted. A review of any opinion in an appeal from a civil trial

165. *See, e.g.*, State v. Conway, No. A17-0730, 2018 WL 1462068, at *5 (Minn. Ct. App. Mar. 26, 2018) (holding a prosecutor committed misconduct when she failed to properly prepare a witness, yet finding the error was harmless because the "prosecutor unintentionally elicited the improper testimony").

166. *See Ramey*, 721 N.W.2d 294

167. *See, e.g.*, State v. Mosley, 853 NW.2d 789, 793 (Minn. 2014); State v. Williams, 525 N.W.2d 538, 540 (Minn. 1994); State v. Strong, No. A08-1528, 2009 WL 2745681 (Minn. Ct. Ap. Sept. 1, 2009).

168. State v. Jackson, 714 N.W.2d 681, 698–701 (Minn. 2006) (Hanson, J., concurring)

would certainly not include a claim that one party committed professional misconduct because inadmissible evidence was admitted. Instead, the argument would be that the judge should have intervened to prevent the error.

Whether intentionally or not, Minnesota courts have equated the mere erroneous admission of evidence with committing prosecutorial misconduct. That equation places an unfair burden on prosecutors. It also gives defense counsel the incentive not to object to the evidence in order to obtain a more favorable standard of appellate review.

Minnesota courts should make clear that the elicitation of inadmissible evidence is prosecutorial misconduct only if the prosecutor intentionally elicits evidence he or she knows is inadmissible. Such a standard ensures that all three pillars of the criminal justice system—the prosecutor, the defense attorney, and the judge—properly monitor the admission of evidence at trial.